Supreme Court, U.S.
FILED
AUG 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2076

In the Supreme Court of the United States

OCTOBER TERM, 1986

BERNARDO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that law enforcement officers acted unreasonably in executing an arrest warrant, and that the government failed to establish his guilt at trial.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 13 counts relating to the unlawful possession and acquisition of firearms. He was sentenced to a total of five years' imprisonment, to be followed by five years' probation.

The evidence at trial established that in September 1983 petitioner pleaded nolo contendere in Florida state court to one count of possession of a controlled substance and to three counts of carrying a concealed firearm, crimes that were punishable by a term of imprisonment in excess of one year. Adjudication was withheld and appellant was placed

on one year's probation. The terms of petitioner's probation included an absolute prohibition on the possession of weapons or firearms. 3 R. 39-40, 53.*

Shortly afterwards, on October 6, 1983, and November 29, 1983, petitioner purchased firearms from federally-licensed firearms dealers. Prior to each of those transactions, petitioner completed a federal firearms form, in each case answering in the negative the following question:

> Have you ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: the actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also a "yes" answer is required if a conviction has been discharged, set aside or dismissed, pursuant to an expungement or rehabilitation statute * * * .)

3 R. 61, 64-65, 70-71, 74-75.

2. On January 30, 1984, petitioner was charged with making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6). A warrant was issued for his arrest. On February 4, 1984, an agent of the Bureau of Alcohol, Tobacco and Firearms went to petitioner's residence to execute the warrant. As he approached the house, the agent recognized another fugitive, Moises Payret, coming out the front door. The agent arrested Payret, who said that petitioner was inside the house and that a young boy standing in the yard was petitioner's son. Pet. App. 2-4.

The agent then called for backup assistance. Additional law enforcement officers arrived shortly thereafter; they surrounded the house some 30 minutes after the call for

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*"R." indicates the record on appeal.

assistance had been made. Pet. App. 4-5. After repeated attempts to communicate with petitioner by means of a bullhorn were unsuccessful, the officers entered the home to execute the warrant. When they did not find petitioner inside, the officers placed a ladder against the exterior wall of the house to inspect the attic. They found that a grating covering the exterior entrance to the attic crawl space had been pushed in. A detective accordingly crawled inside the attic and discovered guns, marijuana, and a white powder. Pet. App. 11-12. Petitioner himself was not in the house, however. He was arrested approximately two weeks later.

Following a hearing, the district court denied petitioner's motion to suppress the evidence that was seized from the attic of his residence. The district court found that the ATF agent had probable cause to believe that petitioner was on the premises when he called for backup help (Pet. App. 4). The court also found that the officers acted reasonably in entering the attic crawl space to determine whether petitioner, or others posing security risks, had hidden inside (*id.* at 8). The district court therefore held that the officers' seizure of the items they found in the crawl space was lawful (*id.* at 12). The court of appeals affirmed petitioner's conviction without opinion (*id.* at 17).

3. Before this Court, petitioner repeats his challenge to the search of his attic. He primarily contends (Pet. 6-7) that the agents "could not have reasonably believed it necessary" to search the attic, asserting that he could not have climbed into the crawl space without being seen by the "continuously surveilling officers." The facts found by the district court, however, do not support this contention. The court specifically found (Pet. App. 5) that the house had not been surrounded by law enforcement officers for a period of 30 minutes after the first agent's arrival, so that petitioner had an opportunity to enter the attic surreptitiously. The court also accepted testimony that the metallic grate at the

entrance to the attic crawl space had been pushed in, giving officers reasonable cause to believe that someone had entered the crawl space. In these circumstances, there is little doubt that the officers acted properly in entering the attic in an attempt to execute the arrest warrant. See *Payton* v. *New York*, 445 U.S. 573 (1980); *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967).

Petitioner's next contention—that he should not have been convicted of violating 18 U.S.C. 922(a)(6) because he did not "knowingly" make a false statement to the firearms dealers (Pet. 7-8)—is without merit. The evidence showed that on September 13, 1983, petitioner pleaded nolo contendere to four felony counts in state court in Florida. While adjudication was withheld and petitioner was placed on one year's probation, petitioner was informed that, as a condition of his probation, he was prohibited from possessing any weapon or firearm. Shortly thereafter, on October 6, 1983, and again on November 29, 1983, petitioner purchased firearms while denying that he ever had been convicted of a crime punishable by imprisonment for a term exceeding one year. On this record, the jury was entitled to find that petitioner knowingly gave a false answer to the question posed on the federal firearms forms. Despite petitioner's contention to the contrary, the Eleventh Circuit's summary affirmance cannot be read as giving approval to a conviction under 18 U.S.C. 922(a)(6) where the defendant lacked criminal intent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986